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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 650

JAMES B. BOREN,

Petitioner,

HONORABLE EDWARD C. McLEAN, United States District Judge for the Southern District of New York,

Respondent.

REPLY BRIEF FOR PETITIONER

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The Statement by the Government in its Brief does not completely and accurately set forth the facts in this case. It does not reflect the matters contained in the Bill of Particulars furnished by the Government, although Rule 21(b) provides that such a bill of particulars shall be considered on an application for a transfer. See pages 9 and 16 of the Petition for Certiorari.

Commencing on page 2 of its Brief and thereafter, the Government attempts, wholly without foundation in law, to create an illusory concept of two classes of defendants, one of "principal defendant" and the other of "salesman defendant". Title 18 U.S.C. § 2, specifically provides that "whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." No statute, no rule, no indictment, and no Bill of Particulars distinguishes between "principal defendants" and others. There are no second-class defendants any more than there are second-class citizens. All those named are named equally as defendants. The Government's device of segregating the defendants into categories is contrived to rationalize the fact that a severance and separate trial

have in fact already been ordered in this case, and has no statutory basis. Convenience of the Government, justified by its "experience" in easing its burden of proof (Respondent's brief, pp. 7 and 8), justifies to the Government severance for these "salesman defendants", but the Government cannot find justification in the protection of the Constitutional rights of the Petitioner.

In an effort to make it appear that there is no similarity of questions presented here and in *Minnesota Mining* v. *Platt*, the Solicitor General attempts to distinguish the Government's own use of the Writ of Mandamus in that case, 314 F. 2d 369 (7th Cir. 1963), on the basis that in such case the issue was the "unusual" one of the ability to obtain a "fair and impartial jury" in the transferee district. Such summary of the "issue" in such case was put otherwise by the Solicitor General in the Petition for Certiorari by the Government in that case. In such Petition, the question presented was said to be:

> "Is a Federal district judge, in determining whether venue transfer would be in 'interest of justice' under Section 21(b) of the Federal Rules of Criminal Procedure required to give heavy or dispositive weight to the fact that the proposed transferee district is the home district of the corporate defendant?"

On page 7 of his Brief, the Solicitor General attempts to deny that *United States* v. *Johnson*, 323 U. S. 273 (1944), stands for the general principle that where an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than disrespected, construction should go in the direction of Constitutional policy even though not commanded by it. Even though the Second Circuit in *United States* v. *Cashin*, 281 F. 2d 669 (2nd Cir. 1960), and the Seventh Circuit in *Minnesota Mining and Manufacturing Company* v. *Platt*, 314 F. 2d 369 (7th Cir. 1963) and in *United States* v. *Choate*, 276 F. 2d 724 (7th Cir. 1960),

have so read the opinion of this Court in that case, the Solicitor General seeks to narrow its applicability to prosecutions under the Federal Dentures Act.

Moreover, the Solicitor General ignores the following matters crucial to the ability of the Petitioner to receive a proper disposition of the charges against him:

1. The question of the inability to bring to New York available character witnesses, and the tremendous burden of expense of defense in the Southern District of New York, which the Petitioner is unable to sustain (Petition for Certiorari, pp. 13, 17).

2. The issue of the crucial conflict between the witness Collins and the Petitioner (Petition for Certiorari, p. 7).

3. The fact that no mailings were made to the Southern District of New York, and that no investors reside therein (Petition for Certiorari, pp. 8 and 9).

4. The policy of the Department of Justice and the Securities and Exchange Commission to prosecute wherever possible securities cases in the Southern District of New York, regardless of other factors (Petition for Certiorari, p. 16).

5. The relationship of the within case to the *Minnesota Mining* case and *United States v. General Motors Corp.*, 194 F. Supp. 754 (S.D.N.Y. 1964) (Petition for Certiorari, pp. 18-19) and the conflict with *United States v. Choate* and the principle represented thereby (Petition for Certiorari, pp. 20-22).

Respectfully submitted,

RICHARD H. WELLS,
Counsel for Petitioner.

New York, N. Y., January 7, 1964.